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09/817,573	03/26/2001	Karl Draganitsch	WRA 32830	7774

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EXAMINER

TRAN LIEN, THUY

ART UNIT

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Paper No. 15

Application Number: 09/817,573
Filing Date: March 26, 2001
Appellant(s): DRAGANITSCH ET AL.

Werner Stemer
For Appellants

EXAMINER'S ANSWER

MAILED
JUL 16 2003
GROUP 1700

This is in response to the appeal brief filed April 28, 2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 2-6 stand or fall with claim 1 and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

2,888,887	Wolf	6-1959
5,709,898	BIGGS et al.	1-1998
4,518,617	HAAS, SR. et al.	5-1985

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-3, 5-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wolf in view of Biggs et al.

Wolf discloses a method of making closed filled wafer strips. The method comprises the steps of placing a single layer of wafer sheets on a suitable conveyor to form a continuous wafer sheet layer, covering the layer with a filling material and then covering the filling layer with a second layer of wafer sheets in the same manner as that described for the first layer. Under certain circumstances, it may, of course, be necessary or desirable to equalize the thickness of the filled wafer strip by suitable pressing means in the form of rollers or bells. It is also possible to have composite

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wafers having several layers of filling material and wafer layers. After cooling, the wafer strip is cut into individual wafers (see columns 1-3).

Wolf does not disclose the sugar content of the wafer, providing an outer coating, the wafer being maintained in a warm state sufficient to have an elasticity to be shaped and the type of filling materials.

Biggs et al. disclose a wafer product in which the wafer contains 28.7% sugar and the wafer product has a coating (see column 2).

It would have been obvious to one skilled in the art include any amount of sugar in the wafer product depending on the taste and flavor desired. The amount of sugar claimed is conventional as shown by Biggs. It would have been obvious to adjust the sugar content depending on the degree of sweetness and the type of filling material used. For example, if the filling is a sweet cream, then it would have been obvious to make the wafer sweet so that the wafer is compatible with the filling. However, if a non-sweet filling is used, it would have been obvious to make the wafer less sweet to be compatible with the filling. The opposite might be done if one wants a contrasting taste. As to the warm state, it is obvious the wafer sheets in Wolf are in a warm state because they undergo compression by the equalizing roll which is the same as the compressing and shaping claimed. It would also have been obvious to coat the wafer product with a coating material as taught by Biggs et al to obtain different flavor and taste. It would also have been obvious to use any type of filling depending on the flavor and taste desired.

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Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Wolf in view of Biggs et al. as applied to claims 1-3 and 5-6 above, and further in view of Haas Sr. et al.

Neither Wolf nor Biggs et al teach cutting the wafer product into hollow bodies and filling the hollow bodies.

Haas Sr. et al teach wafer product can be cut into many different shapes including hollow wafer, hollow stick etc... (see column 1).

It would have been obvious to cut the wafer product into shape desired as Haas et al teach wafer product can be formed into many different shapes. It would also have been obvious to fill the hollow shape to obtained filled wafer product having different taste, flavor and appearance.

(11) Response to Argument

On page 7 of the appeal brief, appellants argue one variation which is not available from the prior art is that the sandwich of the first layer, food product, second layer is subsequently shaped. This argument is not persuasive. The variation referred to by appellants is taught in the Wolf reference. Wolf teaches a wafer strip comprising a first layer, a filling material, and a second layer. The filled wafer strip is passed under an equalizing roll which compresses the entire wafer strip to a desired final thickness. The passing of the strip under the roll accomplishes both compressing and shaping because as the strip is being compressed, the strip is also being shaped because it goes from one thickness to another thickness. On page 9 of the appeal brief, appellants argue the rolling in Wolf is different from the claimed separate processing steps of

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compressing and shaping. The claims as written do not recite separate compressing and shaping and appellants' argument is not consistent with the disclosure. On page 6 line 15, it is disclosed " the pressed device can be designed as a shaping device. Figure 5a shows a pressing device having flat press plates. The compressing of the wafer strip using the pressing device of figure 5A gives the same configuration as that disclosed by Wolf. The specification does not define specifically what " shaping " constitute. The broadest definition of shaping as defined in Webster's II New Riverside University Dictionary is " to give a specific form to, to cause to conform to a specific form or pattern". The rolling in Wolf gives a specific form because the strip is changed in the thickness; thus, the rolling does shape the wafer strip. On page 10 of the appeal brief, appellants argue it is highly unlikely that the wafer sheets themselves are shaped, in the sense of appellants' claims, during the rolling action because the wafer sheets have already been baked and since the sugar content is likely very low in the context of Wolf, these wafer sheets are rather brittle and can no longer be shaped. This argument is based on speculation and is not supported by factual evidence. In the claimed process, the wafer sheets are also baked. Thus, appellants' argument about the wafer sheets being brittle is also applicable to the claimed process. Appellants have not shown any correlation between the amount of sugar and brittleness. Also, the fact that the wafer strip is passed under a roll to be compressed indicates that the wafer sheets are not brittle because the sheets will break when they are being compressed if they are brittle. Appellants further argue the rolling of Wolf is effected while the product is still at an elevated temperature is to assure that the food product can be properly distributed.

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While Wolf wants to distribute the filling during rolling, he also teaches the rolling is done to compress the strip to a desired final thickness. Also, this argument supports the examiner's position that the wafer sheets in Wolf are not brittle during the compression because it is well known in the art that when wafer is still warm, it is flexible.

On page 10 of the appeal brief, appellants state the Bigg et al reference explains that the sugar content defines the malleability of the wafer sheets. It is unclear how appellants view that Bigg et al explains that the sugar content defines the malleability of the wafer sheet. There is no discussion of that nature in the reference. Biggs et al only disclose on column 1 lines 49-50, "additives such as sorbitol, glycerol and monosaccharides, for example, glucose, fructose, will reduce the heat required to achieve the plastic state". There is no discussion of the sugar content defining the malleability of the wafer sheet. The Biggs et al reference supports the fact that the wafer sheets in Wolf are malleable during rolling because they teach "on reheating, wafer sheets become plastic or deformable and are thus able to be shaped". This disclosure teaches that wafer sheets are flexible when they are hot. Appellants further argues, the rolling of the Wolf wafer sheets having the sugar content provided by Biggs et al would lead to a compressed and hardened flat product which would be unacceptable as a confectionery food product. The basis of this argument is not understood. It is well known after the wafer is cooled, it is harden. Why would a compressed hardened flat product be unacceptable as a confectionery food product? The product obtained from the claimed method will also be a hardened compressed

product. Appellants argue Wolf is only able to roll and distribute the inside food product because the wafer sheets are already baked and hard because if the wafer sheets are soft and malleable, the food product would not be laterally distributed. This argument is only a speculation and is not supported by factual evidence. Also, as stated above, Wolf subjects the strip to rolling to compress the strip, not just to distribute the filling. On page 11 of the appeal brief, appellants argue the two references Wolf and Bigg et al are rather incompatible in realistic terms because the resulting food product would not be a proper such product. The Bigg et al reference is only relied upon for the teaching of the sugar content and the coating of wafer product. The Bigg et al reference shows that the sugar content claimed is a conventional amount for wafer product and the coating of wafer product is also conventional. Why would the product of Wolf having the amount of sugar and outer coating taught by Bigg et al not be a proper such product. What do appellants mean by "not be a proper such product"? While making the argument, appellants do not explain their position. It is the examiner's position that the wafer sheets in Wolf are malleable because they are baked just as claimed and they are subjected to compressing and shaping just as claimed. If the wafer sheets are hard and brittle as appellants speculate, they will not be able to be compressed because a hard sheet of wafer will break upon compression.

For the above reasons, it is believed that the rejections should be sustained.

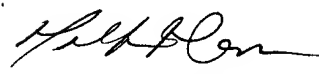
Lien Tran
July 11, 2003


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